

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION**

FIRST STUDENT, INC.¹

Employer

and

Case 4–RC–21452

UNITED STEEL, PAPER, FORESTRY, RUBBER,
MANUFACTURING, ENERGY, ALLIED
INDUSTRIAL AND SERVICE WORKERS
INTERNATIONAL UNION
LOCAL 286²

Petitioner

**REGIONAL DIRECTOR’S DECISION AND
DIRECTION OF ELECTION**

The Employer, First Student, Inc., provides student transportation services from its facility in Doylestown, Pennsylvania (herein called the Facility). The Petitioner, Steelworkers Local 286, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of drivers and aides employed at the Facility. The parties stipulated to the scope and composition of the unit. The sole issue in this case is whether the election should be delayed until the Facility reaches its peak employee complement, as urged by the Employer. The Petitioner contends that the election should not be delayed.

A Hearing Officer of the Board held a hearing, and both parties filed briefs. I have considered the evidence and the arguments presented by the parties and, as discussed below, I have concluded that the anticipated increase in the number of employees actively working for the Employer does not warrant a delay in scheduling the election.

In this Decision, I will first review the factors that must be evaluated in determining the appropriate time frame for an election. Then, I will present the facts and reasoning that support my conclusion.

¹ The Employer’s name appears as amended at the hearing.

² The Petitioner’s name appears as amended at the hearing.

I. FACTORS RELEVANT TO DETERMINING THE ELECTION DATE

The Board's Casehandling Manual (Part Two) Representation Sec. 11302.1, provides that, "An election should be held as early as is practical." It further states that a Regional Director should normally direct an election between the 25th and 30th day following the issuance of a Direction of Election. Where an employer has a fluctuating work force, the Board must balance the goals of ensuring maximum employee participation in the election and permitting current employees to have representation as quickly as possible. *Saltwater, Inc.*, 324 NLRB 343, 344 (1997); *Elsa Canning Co.*, 154 NLRB 1810 (1965). See also *Bituma Corp. v. NLRB*, 23 F.3rd 1432 (8th Cir. 1994), enforcing 310 NLRB No. 167 (1993).³

Seasonal employees are those employees who work in an industry that operates strictly on a seasonal basis, and the Board has set forth various guidelines as to when such employees should be included in bargaining units. See *L & B Cooling, Inc.*, 267 NLRB 1, 2-3 (1983), enfd. 757 F. 2d 236 (10th Cir. 1985); *Maine Apple Growers*, 254 NLRB 501, 502-503 (1984); *Baumer Foods, Inc.*, 190 NLRB 690 (1971); *California Vegetable Concentrates, Inc.*, 120 NLRB 266, 267-268 (1958).⁴ In seasonal industries, the Board has sometimes directed that elections be delayed until the employer's peak season. See *Millbrook, Inc.*, 204 NLRB 1148, 1149 (1973); *Kelly Brothers Nurseries, Inc.*, 140 NLRB 82, 86-87 (1962); *Brooksville Citrus Growers Association*, 112 NLRB 707, 710 (1955).

In contrast, despite some seasonal fluctuations in the size of the work force, where the employer is engaged in virtually year-round operations, and the number of employees in the year-round complement is relatively substantial, the employer's operations are considered "cyclical" and an immediate election is directed so as not unduly to hamper year-round employees in the exercise of their statutory rights. See *Six Flags/White Water & American Adventures*, 333 NLRB 662 (2001); *The Baugh Chemical Company*, 150 NLRB 1034 (1965). See also *Aspen Skiing Corp.*, 143 NLRB 707 (1963).

II. FACTS

The Employer provides transportation services for special needs children to 13 public school districts and 20 private schools in Bucks County, Pennsylvania and surrounding communities. It provides these services pursuant to its contract with the Bucks County Intermediate Unit (herein called the IU), which arranges for various types of assistance to children. The Employer began operating at the Facility in August 2004, when it purchased the operation from its predecessor.

³ The Board's Summary Judgment decision in that case was not published.

⁴ These factors include the size of the area labor force, the stability of the employer's labor requirements and the extent to which it is dependent on seasonal labor, the actual reemployment season-to-season of the work complement, and the employer's recall or preference policy regarding seasonal employees. *Macy's East*, 327 NLRB 73 (1998).

During the regular school year, which runs from approximately early September through mid-June, the Employer functions at its peak level. During the 2007-2008 school year, the Employer operated 47 bus and van routes from the Facility. To staff these routes, the Employer employed approximately 37 bus drivers, 12 to 13 van drivers, and 23 to 24 aides who oversee the children.⁵ The school year routes generally run on a Monday through Friday schedule.

The summer schedule normally lasts for six weeks beginning in early July, and during this time period the Employer's employees transport children to and from summer camps and other activities. The summer routes vary from one day per week to five days. Each route has at least one driver, and a majority of them also have an aide on the vehicle. The IU contracts with the Employer for fewer routes in the summer than during the school year: in 2005, the Employer had 26 bus and van routes; in 2006, it had 23 routes; and in 2007, it had 31 routes.

During the summer, employees who worked during the school year are expected to choose between two options. They may sign up to bid on routes for the entire six weeks, or they may make themselves available to work for two to three weeks as on-call employees. Those who do neither – a very small minority of employees – are ineligible to collect unemployment compensation for the summer period. In the past three years, the summer routes have required the Employer to assign work to about 40 to 45 of its employees. Until the routes commence in early July, however, the Employer does not know how many contracts it will receive from the IU. Thus, the Employer's witnesses at the hearing could not say for certain how many employees would be required to work this summer.⁶

The Employer does not hire any employees to work exclusively in the summer. Although it placed an advertisement in a local newspaper on June 6, 2008 seeking drivers and aides and claiming that summer work was available, the Employer's Dispatcher, Vicky Lydon, testified that any employee hired during the summer would probably be unable to work until the school year began because of the time required for training and background checks.

Since the Employer has operated at the Facility, there has been little turnover among its employees from school year to school year. Dispatcher Lydon testified that on average, there might be three employees who do not return each year. The record contains no evidence that employees who do not work during the summer are required to reapply for work prior to the commencement of the school year, and there is no indication that the Employer has ever failed to recall any employees at the start of the new school year. To the contrary, all employees who worked during the previous school year are summoned to an annual "kickoff" meeting in early August, a three-hour session in which employees are advised of any policy changes, possible

⁵ Although the parties stipulated that there are 81 employees at the Facility, some of them are non-unit employees. The exact number of unit employees constituting the Employer's full school year complement is not in the record, but in their briefs, both parties suggested that there are between 75 and 80 unit employees.

⁶ Dispatcher Lydon testified that as of June 11, 2008, the date of the hearing, the IU had sent her the names of 15 children who were scheduled to attend 10 different schools this summer. She testified, however, that none of those routes represents a guaranteed contract until it actually commences, and any of them could be rescinded by the IU or cancelled by the child's family.

routes in the coming year, and safety issues, among other things. Employees receive notice of this meeting from a bulletin board posting at the Facility. According to the Employer, all employees are expected to attend the meeting, but not all of them actually do so.

III. ANALYSIS

The Employer contends that its operation is seasonal, and therefore the Board should delay the election until it reaches its peak employee complement in order to enfranchise the most possible employees. The Petitioner contends that any delay in the election is unwarranted and would impair employees' ability to exercise their Section 7 rights.⁷

The record shows that the Employer does not run a truly seasonal operation, and employees who do not work during the summer are not seasonal employees. In this connection, the Employer transports children all year round, although it operates fewer vehicles and requires fewer employees during the summer. Some employees are annually laid off due to the seasonal fluctuations in the Employer's operations, but they can anticipate working for the Employer again within a short time after their layoffs.

Thus, based on the Employer's experience over the past three years, a substantial majority of the Employer's drivers and aides employed during the regular school year either remain actively employed by the Employer at some time during the summer, or are on-call and available for work. In fact, while the record did not disclose the exact numbers, it is clear that more than half of the year-round employee complement has actually worked for the Employer for all or part of each of the last three summers. The employees who are working or on-call need to remain in the vicinity of the Facility to be able to fulfill their employment obligations, and there is no evidence that any employee will be leaving the area this summer. Moreover, even the few employees who choose not to work or remain on-call during the summer can all reasonably expect to resume active work status when the school year begins, as they have consistently done in previous years. Indeed, *all* employees from the prior school year are expected to attend an annual meeting in early August in anticipation of their return to work in September. In these circumstances, there is no reason to believe that an election held during the summer months would disenfranchise any unit employees.⁸

⁷ The Petitioner also contends that the Region should consider whether a mail ballot election or mixed mail/manual election is necessary, whereas the Employer argues that a mail ballot or mixed election is not appropriate. Election arrangements, however, are not matters within the scope of a preelection hearing. Rather, pursuant to the Board's longstanding practice, the election arrangements will be determined administratively by the undersigned Regional Director following the issuance of this Decision. See Casehandling Manual (Part Two) Representation Sec. 11301.4. Cf. *Halliburton Services*, 265 NLRB 1154 (1982); *Manchester Knitted Fashions*, 108 NLRB 1366, 1367 (1954).

⁸ No party contends that any of the employees who are not working this summer are ineligible to vote, and as the record shows that all employees who do not work during the summer have an expectation of reemployment during the school year, absent unique circumstances, they are all eligible to vote in the election.

The Employer asserts that the number of employees to whom it will offer work this summer is uncertain because the IU has not yet determined how many routes will be needed. However, the number of routes and employees has remained relatively stable for the last three summers, and, in fact, the summer of 2007 had the highest employee complement of the three years. In the absence of evidence to suggest that circumstances will be different this year, it is reasonable to assume that the Employer's operations will remain consistent with its previous experience.

Accordingly, I find that during the summer months, the entirety of the Employer's school year employee complement is eligible to vote, and therefore it is appropriate to hold an election in the Board's usual time frame rather than to defer it until the school year begins. *Six Flags/White Water & American Adventures*, 333 NLRB 662 (2001); *The Baugh Chemical Company*, 150 NLRB 1034 (1965).⁹

IV. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and for the reasons set forth above, I conclude and find as follows:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The parties stipulated, and I find, that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

⁹ If the Board's test for determining the expectation of future employment for seasonal employees were used, it would show that all employees in the unit have a reasonable expectation of reemployment in the 2008-2009 school year. Thus, the Employer has had stable labor requirements each year, expressed a clear preference for retaining the same employees from year-to-year, and reemployed virtually all of the unit employees every year.

This Decision is made without prejudice to the Petitioner's right to file a motion for reconsideration of the matter, should the number of routes be significantly lower than in prior years.

All full time and regular part-time drivers and aides employed by the Employer at its 4070 Skyron Drive, Doylestown, Pennsylvania facility, **excluding** all other employees, dispatchers, office clerical employees, professional employees, guards, and supervisors as defined by the Act.

V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for the purposes of collective bargaining by **United Steel, Paper, Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union Local 286**. The date, time, and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

A. Eligible Voters

The eligible voters shall be unit employees employed during the designated payroll period for eligibility, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, employees engaged in an economic strike, which commenced less than 12 months before the election date, who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Employees who are otherwise eligible but who are in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are: 1) employees who have quit or been discharged for cause after the designated payroll period for eligibility; 2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date; and 3) employees engaged in an economic strike which began more than 12 months before the election date who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the **full** names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized

(overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, One Independence Mall, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106 on or before **July 14, 2008**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (215) 597-7658, or by electronic filing through the Agency's website at **www.nlrb.gov**. Guidance for electronic filing can be found under the **E-Gov** heading on the Agency's website. Since the list will be made available to all parties to the election, please furnish a total of two **(2)** copies, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of three **(3)** working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least five **(5)** working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on non-posting of the election notice.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. A request for review may also be submitted by electronic filing through the Agency's website at **www.nlrb.gov**. A copy of the request for review must be served on each of the other parties to the proceeding, and with the Regional Director either by mail or by electronic filing. Guidance for electronic filing can be found under the **E-Gov** heading on the Agency's website. This request must be received by the Board in Washington by 5:00 p.m., EDT on **July 21, 2008**.

Signed: July 7, 2008

at Philadelphia, Pennsylvania

/s/ [Dorothy L. Moore-Duncan]
DOROTHY L. MOORE-DUNCAN
Regional Director, Region Four
National Labor Relations Board